Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1061

SANG YON SHIN,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

(Ninth Circuit No. 75-3582)

JOON DUCK CHOI,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

(Ninth Circuit No. 75-3583)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

(Ninth Circuit No. 75-3583)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SANG YON SHIN and JOON DUCK CHOI jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit which involve identical questions of law and substantially similar questions of fact. The Memorandum decision in the case of SANG YON SHIN v. IMMIGRATION AND NATURALIZATION SERVICE (No. 75-3582) was entered on December 13, 1976. The Memorandum decision in the case of JOON DUCK CHOI v. IMMIGRATION AND NATURALIZATION SERVICE (No. 75-3583) was entered on December 15, 1976.

Decisions Below.

The decisions of the Court of Appeals, set forth in Memoranda, have not been reported. The Memorandum in the case of SANG YON SHIN v. IMMIGRATION AND NATURALIZATION SERVICE (No. 75-3582) is set forth in Appendix A, Page 1. The Memorandum in the case of JOON DUCK CHOI v. IMMIGRATION AND NATURALIZATION SERVICE (No. 75-3583) is set forth in Appendix I, Page 21.

Jurisdiction.

In the SHIN case (No. 75-3582) the judgment of the Court of Appeals (Appendix A, *infra,* p. 1) was entered on December 13, 1976. On January 7, 1977, an Order Staying Issuance of Mandate was entered by the Court of Appeals for the Ninth Circuit (Appendix C, *infra,* p. 5) providing petitioner the opportunity to file this Petition for Writ of Certiorari on or before January 12, 1977. On January 12, 1977, there was submitted to the Court of Appeals for the Ninth Circuit on behalf of SANG YON SHIN, a Motion for Additional Stay of Mandate Pending Application for Certiorari (Appendix D, *infra,* p. 6). On January 17, 1977, an Order Staying Issuance of Mandate was entered (Appendix E, *infra,* p. 9) providing petitioner the opportunity to file this Petition on or before February 11, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

In the CHOI case (No. 75-3583) the judgment of the Court of Appeals (Appendix I, *infra,* p. 21) was entered on December 15, 1976. On January 3, 1977, there was submitted to the Court of Appeals for the Ninth Circuit, on behalf of JOON DUCK CHOI, Motion for Stay of Mandate Pending Application for Certiorari (Appendix J, *infra,* p. 23). On January 14, 1977, an Order Staying Issuance of Mandate was entered by the Court of Appeals for the Ninth Circuit (Appendix K, *infra,* p. 25) providing petitioner the opportunity to file this Petition for Writ of Certiorari on or before January 14, 1977. On January 20, 1977, there was submitted to the Court of Appeals for the Ninth Circuit on behalf of JOON DUCK CHOI, a Motion for Additional Stay of Mandate Pending Application for Certiorari (Appendix L, *infra,* p. 26). Said Motion has not yet been acted upon. This Court has jurisdiction under 28 U.S.C. 1254(1).

Question Presented.

Whether in deportation proceedings the Immigration and Naturalization Service, having recognized an alien's eligibility for the privilege of voluntary departure in lieu of deportation, a statutory requisite of which is that the alien shall not have given false testimony to obtain a benefit under the Immigration and Nationality Act, may at the same time deny as a matter of discretion the alien's application for adjustment of status to permanent resident upon the factual conclusion that he falsely represented to an American consul abroad the purpose of his travel to the United States when he obtained the nonimmigrant visa with which he entered the United States.

Statutory Provisions Involved.

Section 101(f) of the Immigration and Nationality Act [8 U.S.C. 1101(f)(6)] provides that:

> "For the purposes of this Act—No person shall be regarded as, or found to be, a person of

good moral character who, during the period for which good moral character is required to be established, is, or was . . .

(6) One who has given false testimony for the purpose of obtaining any benefits under this Act."

Section 244(e) of the Immigration and Nationality Act [8 U.S.C. 1254(e)] provides as follows:

"(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

Section 245(a) of the Immigration and Nationality Act [8 U.S.C. 1255(a)] provides that:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

Statement.

A detailed factual statement relating to each of the petitioners is set forth in the Appendix. The factual statement relating to petitioner SANG YON SHIN (No. 75-3582) is set forth in Appendix F, *infra*, page 10. The factual statement relating to petitioner JOON DUCK CHOI (No. 75-3583) is set forth in Appendix M, *infra*, page 30.

In each case the principal alien and members of his family entered the United States on the basis of nonimmigrant transit visas entitling them to remain in the United States not to exceed twenty-nine days, claiming to be in continuous transit from the Republic of Korea to Brazil. Neither departed from the United States within the allotted time, and in each case the principal alien applied for adjustment of status to that of permanent resident under the provisions of Section 245 of the Immigration and Nationality Act [8 U.S.C. 1255] and for the alternative discretionary relief of voluntary departure in lieu of deportation under Section 244(e) of the Act [8 U.S.C. 1254(e)].

In each case the Immigration Judge denied the principal alien's application for adjustment of status, but granted the alien's application for the privilege of voluntary departure in lieu of deportation at his own expense. In each case the decision of the Immigration Judge was affirmed by the Board of Immigration Appeals.

On November 25, 1975, each petitioner filed a Petition for Review of Final Order of Deportation with the United States Court of Appeals for the Ninth Circuit, contending that the Immigration and Naturalization Service had held the respective petitioners to a higher standard for the favorable exercise of dis-

cretion with respect to the adjustment of status applications than was required by precedent decisions of the Board of Immigration Appeals, and that the grant of voluntary departure in lieu of deportation precluded the factual determination that each petitioner had falsified information to obtain nonimmigrant visas from an American consul abroad.

REASONS FOR GRANTING THE WRIT.

In each of the cases herein presented the Immigration and Naturalization Service concurrently reached antithetical conclusions with respect to the crucial factual circumstances under which each alien obtained the visa with which he entered the United States.

The Immigration and Naturalization Service in each case recognized the alien's entitlement to the privilege of voluntary departure in lieu of deportation in accordance with the provisions of Section 244(e) of the Immigration and Nationality Act [8 U.S.C. 1254(e)]. Although no specific finding of statutory eligibility for such privilege was made, such a finding was not required by the regulations [8 C.F.R. §242.18(a)].

Section 244(e) of the Immigration and Nationality Act [8 U.S.C. 1254(e)] provides that the Attorney General may in his discretion permit an alien under deportation proceedings (with certain exceptions not here relevant) to depart voluntarily from the United States at his own expense in lieu of deportation, *if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under said subsection.*

The alien bears the burden of proof to establish eligibility for voluntary departure. *Trias-Hernandez v. Immigration and Naturalization Service,* 528 F.2d 366, 370 (9th Cir. 1975); *Khalaf v. Immigration and Naturalization Service,* 361 F.2d 208 (7th Cir. 1966). Good moral character of the alien is a prerequisite. *Trias-Hernandez v. Immigration and Naturalization Service, supra,* at page 370.

One who has given false testimony for the purpose of obtaining a benefit under the Immigration and Nationality Act during the period for which good moral character is required to be established may not be regarded as, or found to be, a person of good moral character. Section 101(f)(6) Immigration and Nationality Act [8 U.S.C. 1101(f)(6)].

The aliens in each case herein presented satisfied both the Immigration Judge and the Board of Immigration Appeals not only that they were statutorily eligible for the privilege of voluntary departure in lieu of deportation, but also that they merited the favorable exercise of the Attorney General's discretion. Each alien entered the United States with a nonimmigrant visa which entitled him to be admitted for a temporary period, upon his representation to the American consul in Seoul, Korea, that he was to travel through the United States enroute to Brazil. By the grant of voluntary departure the Service made the [implicit] statutorily required finding that each alien gave no false testimony when he obtained his nonimmigrant transit visa. Yet the Service reached the incompatible conclusion that each alien did not in fact intend to proceed to Brazil, but rather intended to circumvent the normal [immigrant] visa issuing process and reside permanently in the United States when he obtained his nonimmigrant visa, and upon such conclusion exercised discretion adversely to each alien by denying his application for adjustment of status to permanent resident.

The Court of Appeals for the Ninth Circuit, by affirming the decisions of the Immigration and Naturalization Service in each of the cases herein presented, has permitted the Service in effect to mount its horse

and simultaneously ride in opposite directions. The decisions of that Court have so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

Conclusion.

No court should permit any administrative agency to take conflicting positions upon a single set of facts. The administrative agency should be made to resolve the conflicting factual determinations. The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD T. GRIFFIN,
Counsel for Petitioners.

APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin, *Petitioner,* vs. Immigration and Naturalization Service, *Respondent.* No. 75-3582.

[December 13, 1976].

On Petition to Review a Decision of the United States Immigration and Naturalization Service.

Before: ELY and SNEED, Circuit Judges, and WILLIAMS,* District Judge.

This is a deportation proceeding wherein the petitioner, a Korean citizen, concedes deportability, but argues that the Immigration judge held the petitioner to an overly onerous burden of proof in establishing eligibility for adjustment of status. The respondent denied adjustment, and this Petition was presented.

Both the immigration judge and the Board of Immigration Appeals found that the petitioner entered the United States on a transit visa with a preconceived intent to remain permanently. Such a finding justifies denial of an application for adjustment of status. *Soo Yuen v. INS,* 456 F.2d 1107 (9th Cir. 1972); *Santos v. INS,* 375 F.2d 262 (9th Cir. 1967). The question of adjustment of status is discretionary, and absent abuse of that discretion, we cannot interfere. *Thomaidis v. INS,* 431 F.2d 711 (9th Cir. 1970). *Astudillo v. INS,* 443 F.2d 525 (9th Cir. 1971).

In view of the respondent's critical finding, it does not appear, in the circumstances of this case, that

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*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

the immigration judge erred in requiring a showing of "outstanding equities," even under *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). Under that decision, a showing of "outstanding equities" may be necessary when adverse factors exist; here, the finding of an illicit intent existing when the petitioner entered this country is an adverse factor justifying a denial of adjustment of status in the absence of persuasive equities.

The petitioner's argument that the fact that the respondent allowed him voluntary departure disproves the fact that he made numerous misrepresentations to the respondent has no merit whatsoever. On the question of whether voluntary departure should be permitted, the respondent has wide latitude.

AFFIRMED.

APPENDIX B.

Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion (I&NS File No. A19 914 852).

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. C.A. 75-3582.

Jan. 3, 1977.

The petitioner, through the undersigned, moves this Court for a stay of the mandate upon the memorandum decision of the above-entitled Court entered on December 13, 1976, affirming the decision of the Board of Immigration Appeals dated June 26, 1975, for a period of thirty days, to and including February 2, 1977, in order to permit petitioner to make application to the Supreme Court of the United States for a Writ of Certiorari to review the memorandum decision of the above-entitled Court affirming the decision of the Board of Immigration Appeals.

No petition for rehearing has been or will be filed with respect to the decision of the above-entitled Court entered on December 13, 1976.

Petitioner desires and intends to apply to the Supreme Court of the United States for a Writ of Certiorari for review of the order of the above-entitled Court affirming the decision of the Board of Immigration Appeals.

This motion is based on the pleadings heretofore filed in the above-entitled proceedings and the attached memorandum in support of motion.

DATED: December 30, 1976.

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:
/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

MEMORANDUM IN SUPPORT OF MOTION

Petitioner contends that the factual circumstances upon which the decision of the Immigration Service is predicated denying to petitioner the favorable exercise of discretion upon his application for status as a permanent resident are inconsistent and not compatible with the factual circumstances found to exist and which were required by statute to exist in the grant of voluntary departure to petitioner.

This Court may stay the mandate upon its memorandum decision entered on December 13, 1976, affirming the decision of the Board of Immigration Appeals for a period not to exceed thirty days, pursuant to *Rule 41, Rules of Appellate Procedure.*

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:

/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

APPENDIX C.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin, Petitioner, vs. Immigration & Naturalization Service, Respondent. No. 75-3582, I&NS #A 19 914 852.

Filed: Jan. 7, 1977.

Upon application of Richard T. Griffin, Esquire counsel for the Petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before January 12, 1977.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Walter Ely
Walter Ely
United States Circuit Judge.

DATED: Los Angeles, Calif., January 6, 1977.

APPENDIX D.

Motion for Additional Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion (I&NS File No. A19 914 852).

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. C.A. 75-3582.

Received Jan. 12, 1977.

The undersigned, counsel for petitioner in the above-entitled proceedings, on behalf of said petitioner moves this Court for stay of the mandate upon the memorandum decision of the above-entitled Court entered on December 13, 1976, affirming the decision of the Board of Immigration Appeals dated June 26, 1975, for additional time, to and including February 2, 1977, pending the filing of a Petition for a Writ of Certiorari with the Supreme Court of the United States.

On December 30, 1976, petitioner forwarded to the above-entitled Court a Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion. On January 7, 1977, the above-entitled Court made an Order staying issuance of mandate until January 12, 1977, a copy of which Order was received by the undersigned on January 10, 1977.

The undersigned also represents JOON DUCK CHOI, petitioner in Case No. C.A. 75-3583, a case involving identical questions of law and substantially similar questions of fact as those involved in the within proceedings. On December 15, 1976, a memorandum decision of the above-entitled Court was entered in Case No. C.A. 75-3583 affirming the decision of the Board of Immigration Appeals, dated May 27, 1975.

On December 30, 1976, I forwarded to the above-entitled Court on behalf of JOON DUCK CHOI, petitioner in Case No. 75-3583, a Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion in said action. On January 10, 1977, I contacted the office of the Clerk of the above-entitled Court, by telephone, and I was informed that the motion for stay in Case No. C.A. 75-3583 is still pending.

I was unable to present motions for stay of mandate pending application for Certiorari in the instant proceedings as well as in Case No. CA 75-3583 prior to December 30, 1976, because of the difficulty encountered in arranging a joint meeting with SANG YON SHIN, petitioner in the instant proceeding, and JOON DUCK CHOI, petitioner in Case No. C.A. 75-3583, to discuss the advisability of filing a joint petition for Writ of Certiorari with the Supreme Court of the United States. It was subsequently determined to be the desire of both petitioners to file a joint petition for Writ of Certiorari.

Because of the necessity of printing the Petition for Writ of Certiorari to the United States Supreme Court, and because the petitioners in both the instant proceeding and Case No. C.A. 75-3583 desired to file a joint Petition for Writ of Certiorari, it was not possible to draft the petition for presentation to the printer until decisions on both motions for stay of mandate had been received. On January 10, 1977, I spoke by telephone with J. MARK WAXMAN, Assistant United States Attorney, representing the respondent in the instant proceeding as well as Case No. C.A. 75-3583, with respect to this application for an additional stay of mandate to file the Petition for

Writ of Certiorari. Mr. Waxman informed me that he took no position with respect to such application.

It is respectfully requested that an additional stay of mandate be granted to and including February 2, 1977, to permit the preparation and filing of joint petition for Writ of Certiorari to the Supreme Court of the United States on behalf of SANG YON SHIN in Case No. C.A. 75-3582, and JOON DUCK CHOI in Case No. C.A. 75-3583.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of January, 1977, at Pasadena, California.

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:
/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

MEMORANDUM IN SUPPORT OF MOTION

A stay of the mandate pending application to the Supreme Court for a Writ of Certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

Rule 41(b), Rules of Appellate Procedure

APPENDIX E.

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin, Petitioner, vs. Immigration & Naturalization Service, Respondent. No. 75-3582, I&NS #A19 914 852.

Filed: January 17, 1977.

Upon application of Richard T. Griffin, Esquire counsel for the Petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before February 11, 1977.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Walter Ely
Walter Ely
United States Circuit Judge.

DATED: Los Angeles, Calif., January 14, 1977.

APPENDIX F.

Statement of Facts Re Sang Yon Shin (No. 75-3582).

Petitioner SANG YON SHIN is a 52 year old male, a native and citizen of Korea, who entered the United States at Los Angeles, California, on April 21, 1971, as a nonimmigrant in transit to Brazil. He was authorized to remain in the United States until May 19, 1971, but failed to depart.

On August 5, 1970, a Korean passport was issued to petitioner Shin in Seoul, Korea, for the purpose of emigrating to the Federative Republic of Brazil. On February 12, 1971, he obtained a tourist visa for entry into Brazil. At the same time similar visas were obtained for his wife and children. He testified that in order to obtain an immigrant visa to Brazil it was necessary to be examined by a physician at the Brazilian Embassy in Seoul, and that no physician was available at the time so he was issued a tourist visa. He further testified that prior to obtaining the tourist visa to Brazil he shipped household goods, including clothing, kitchen utensils and Korean food, to Brazil.

On February 9, 1971, petitioner Shin made application to the American consul in Seoul for a nonimmigrant visa, and after numerous trips back to the consul he submitted a subsequent application and was issued a C-1 visa on April 19, 1971. Applications for nonimmigrant visas for his wife and children were submitted at the same time.

On April 21, 1971, petitioner Shin and his three children entered the United States. His wife remained in Korea to dispose of their remaining property. She

arrived in the United States on May 19, 1971. Following her arrival she spent approximately ten days in bed because of illness. Petitioner Shin testified that it was his intention to depart from the United States within a few days after his wife's arrival, and that it was following her arrival that the decision to remain in the United States was made, because acquaintances at their sponsor's church advised them that living in Brazil was not as good as they had been led to believe and they would be better off returning to Korea. Petitioner Shin thereafter undertook steps to remain in the United States, and upon advice of counsel he invested in a business.

At the time of the hearing before the Immigration Judge petitioner Shin was in the process of selling his business in order to invest in a larger one. The sale was not finalized until August 2, 1973, at which time petitioner Shin and his wife realized cash in the sum of $6,284.24, and a promissory note in the face amount of $7,012.05. The sale was made subject to additional encumbrances in the approximate sum of $16,109.87.

On December 27, 1973, petitioner Shin and his wife completed the arrangements for the purchase of a new grocery market business in Downey, California, for the price of $31,030.35, with a cash down payment of $23,825.00, and the balance evidenced by a promissory note.

Petitioner Shin subsequently filed an application for status as a permanent resident with the Immigration and Naturalization Service at Los Angeles, which application was denied by the District Director on August 23, 1972, upon the ground that he and his family

were not bona fide nonimmigrants in transit at the time of his last entry into the United States and that he and his family had preconceived a plan to gain entry to remain permanently and obtain eventual permanent resident status.

An Order to Show Cause was issued by the District Director on March 27, 1973, and the application for status as permanent resident was resubmitted in deportation proceedings held on July 19-20, 1973. On July 20, 1973, said application was denied by the Immigration Judge on the following grounds:

> "First, I do make a definite finding there was a preconceived plan to remain indefinitely in the United States.
>
> "Second, he has failed to establish that he has made an investment in a business enterprise within the contemplation of the regulations.
>
> "And third, assuming he has met all the statutory requirements, his application should nevertheless be denied because as a nonimmigrant C-1 in transit, he does not merit the extraordinary discretionary relief of adjustment of status because there is (sic) no outstanding equities in his favor."

The Board of Immigration Appeals refused to consider the issue relating to petitioner's qualifications as an investor, but affirmed the decision of the Immigration Judge that petitioner did not merit the favorable exercise of discretion. The Board agreed with the Immigration Judge that petitioner entered the United States with a preconceived intent to remain. It concluded that petitioner had attempted to circumvent the visa issuing process and could find no significant favorable factors present in his case. The Board also affirmed

the order of the Immigration Judge granting petitioner the privilege of voluntary departure in lieu of deportation.

On November 25, 1975, a petition for review of the final order of deportation (Appendix G, *infra*, pages 14-16) was filed with the United States Court of Appeals for the Ninth Circuit (Case No. 75-3582) pursuant to Section 106(a) of the Immigration and Nationality Act, as added, 75 Stat. 651, 8 U.S.C. 1105a (a) contesting the decision of the Immigration Judge as a misunderstanding of the law in that he held the petitioner to a much more onerous burden of proof in establishing eligibility for discretionary relief than was required by precedent decisions of the Board of Immigration Appeals and further, that the decision of the Board of Immigration Appeals was not supported by any evidence, in light of its determination that the petitioner did not present false testimony in order to obtain his nonimmigrant visa.

The Ninth Circuit Court of Appeals affirmed the decision of the Board in a Memorandum decision filed December 13, 1976 (Appendix A, *infra*, page 1).

APPENDIX G.

United States Department of Justice, Board of Immigration Appeals, Washington, D.C. 20530.

File: A19 914 852—Los Angeles.

In re: Sang Yon *Shin*.

In deportation proceedings.

Appeal on behalf of respondent: Richard T. Griffin, Esq. 301 E. Colorado Blvd. Pasadena, CA 91101.

On behalf of I&N Service: Irving A. Appleman Appellate Trial Attorney.

Oral Argument: February 11, 1974.

Charge: Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant—remained longer than permitted.

Application: Adjustment of status under section 245 of the Immigration and Nationality Act.

In a decision dated July 20, 1973, the immigration judge found the respondent deportable, denied the respondent's application for adjustment of status under section 245 of the Immigration and Nationality Act, but granted the respondent the privilege of voluntary departure. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a native and citizen of Korea who entered the United States on April 21, 1971, as a nonimmigrant alien in immediate and continuous transit through the United States. He entered with a visa indicating that he was en route to Brazil, and he was authorized to remain here until May 19, 1971. He has remained beyond that time, and he concedes deportability as a nonimmigrant who has remained

in the United States for a longer time than permitted. The only issues on appeal involve the respondent's application for adjustment of status.

The respondent seeks adjustment of status as a nonpreference immigrant. He contends that he is exempt from the labor certification requirements of section 212(a)(14) as an "investor" within the contemplation of 8 C.F.R. 212.8(b)(4).

The immigration judge found that the respondent did not qualify as an "investor." We, however, need not reach this issue because we agree with the immigration judge that the respondent does not merit a favorable exercise of discretion, even if he satisfies the requirements of 8 C.F.R. 212.8(b)(4).

The respondent entered the United States claiming that he was in transit to Brazil. He had, however, unsuccessfully attempted to obtain a business visitor's visa from the American Consulate in Korea prior to applying for his transit visa. He nevertheless indicated on his transit visa application that he had never before applied for a United States visa.

At the hearing, the respondent testified that he had been preparing to immigrate to Brazil for a significant period of time after he sold a grocery market he owned in Korea (Tr. pp. 5-6). However, the respondent did not seem to be very knowledgeable with respect to Brazilian politics, geography or economics (see Tr. pp. 25-26). Furthermore, the respondent contends that he heard discouraging reports on life in Brazil only after his arrival in the United States (Tr. pp. 10-11).

The respondent arrived in the United States with approximately $30,000 in United States currency (Tr.

p. 7). He rented an apartment shortly after his arrival here (Tr. p. 9), and he arranged to purchase property here less than two months after his entry.

We agree with the immigration judge's conclusion that the respondent entered the United States with a preconceived intent to remain.

The respondent attempted to circumvent the visa issuing process. There are no significant favorable factors present in his case. The denial of adjustment of status in the exercise of discretion was proper.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 31 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

APPENDIX H.

Petition for Review of Final Order of Deportation (I&NS File No. A19 914 852—Los Angeles).

United States Court of Appeals, for the Ninth Circuit.

Sang Yon Shin Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 75-3582.

Filed: 11-25-75.

Petitioner, SANG YON SHIN, by his attorneys, GRIFFIN, GRIFFIN & JACKSON, by RICHARD T. GRIFFIN, alleges as follows:

I

This is an action for judicial review of a final order of deportation pursuant to Section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

II

The petitioner, who was born September 15, 1923, is a native and citizen of Korea, presently residing in the City of South Gate, County of Los Angeles, State of California. He last entered the United States at Los Angeles, California, on April 21, 1971, as a nonimmigrant in transit for a temporary period and authorized to remain in the United States until May 19, 1971.

III

The IMMIGRATION AND NATURALIZATION SERVICE is made the respondent in this action pursuant to Section 106(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(3).

IV

On July 20, 1973, in deportation proceedings held at the District Office of the Immigration and Naturali-

zation Service in Los Angeles, California, petitioner's application for adjustment of status to permanent resident pursuant to Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, predicated upon his investment of a substantial amount of capital in a grocery market, was denied by the Immigration Judge, and he was found deportable under Section 241(a)(2) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(2). He was accorded the privilege of voluntary departure provided he departed from the United States within thirty days, and failing to do so an alternate order of deportation was made providing for his deportation to Korea. An appeal from the decision of the Immigration Judge was duly taken to the Board of Immigration Appeals, Washington, D.C. On June 26, 1975, the Board of Immigration Appeals rendered its decision sustaining the order of the Immigration Judge made on July 20, 1973, and petitioner's appeal was dismissed. Said order of the Immigration Judge is now final.

V

The validity of said order of deportation has not been upheld in any prior civil or criminal proceedings.

VI

Petitioner contests the validity of said order of deportation on the ground that the Immigration Judge abused the discretion vested in him in denying petitioner's application for adjustment of status to that of a permanent resident, and that the Board of Immigration Appeals likewise abused its discretion in sustaining the decision of the Immigration Judge, in that a more stringent standard of eligibility for such discretionary

relief was applied than was authorized or required by applicable regulations and administrative precedent.

VII

Petitioner represents that similar issues are presented in the Matter of KOH, INS File No. A19 908 390, in which a Petition for Review of Deportation Order is now pending before the above-entitled Court, and in Matter of CHOI, INS File No. A19 936 054, in which a Petition for Review of Final Order of Deportation will shortly be filed in the above-entitled Court. All three matters were decided by the same Immigration Judge, SAMUEL L. HOZMAN.

VIII

Petitioner is informed and believes and on such information and belief alleges that in Matter of KOH, decided on November 20, 1972, the Immigration Judge stated that he was unable to find that the principal alien had a preconceived intent to evade or circumvent the visa issuing process when he obtained a transit visa to enter the United States. In Matter of CHOI, decided on June 15, 1973, the Immigration Judge discussed the subject of preconceived intent but made no findings with respect to said issue. In the instant proceedings, decided on July 20, 1973, the Immigration Judge specifically found that petitioner had a preconceived intent to remain in the United States when he obtained his nonimmigrant transit visa. In each case the Immigration Judge held that the applicant was not entitled to the "extraordinary relief" of adjustment of status because he entered the United States with a transit visa. In each case the Board of Immigration Appeals failed to enunciate the proper standard

to be applied to an alien who entered the United States with a transit visa seeking adjustment of status to permanent resident. The finding of preconceived intent to circumvent the normal visa issuing process in each instance by the Board of Immigration Appeals was arbitrary, capricious and unreasonable, and results in a failure to exercise its discretion with regard to the appropriate standards to be applied to the case of an applicant for adjustment of status who entered the United States with a C-1 transit visa.

WHEREFORE, petitioner prays for an order setting aside the outstanding order of deportation against him and remanding the matter to the Immigration Service for further proceedings in accordance with the appropriate administrative standard of eligibility for the relief requested.

DATED: November 25, 1975.

GRIFFIN, GRIFFIN & JACKSON, By:
/s/ Richard T. Griffin
Richard T. Griffin
Attorneys for Petitioner

APPENDIX I.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Joon Duck Choi, *Petitioner,* vs. Immigration & Naturalization Service, *Respondent.* No. 75-3583.

[December 15, 1976].

Petition to Review a Decision of the U.S. Immigration & Naturalization Service.

Before: WALLACE and SNEED, Circuit Judges, and GRAY,* District Judge.

This is a proceeding for review of an INS denial of adjustment of status, in conjunction with a deportation proceeding. The petitioner, a Korean citizen, concedes deportability but argues that the immigration judge held him to an overly onerous burden of proof in establishing eligibility for adjustment of status. We affirm.

The Board of Immigration Appeals (BIA) specifically found that the petitioner entered the United States on a transit visa with a preconceived intent to remain permanently. Such a finding justifies denial of an application for adjustment of status. *Soo Yuen v. INS,* 456 F.2d 1107 (9th Cir. 1972); *Santos v. INS,* 375 F.2d 262 (9th Cir. 1967). The question of adjustment of status is completely discretionary with the INS, and unless there is an abuse of discretion, we will not interfere with its findings. *Astudillo v. INS,* 443 F.2d 525 (9th Cir. 1971); *Thomaidis v. INS,* 431 F.2d 711 (9th Cir. 1970).

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*Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

In view of this finding, if the immigration judge erred in requiring a showing of "outstanding equities," such error was not prejudicial. Under *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970), on which the petitioner bases his allegation of error, a showing of "outstanding equities" may be necessary when adverse factors exist; here, the Board's finding of an illicit intent to remain permanently is clearly an adverse factor justifying a denial of adjustment of status in the absence of other equities.

It appears that the BIA erroneously permitted voluntary departure in lieu of deportation, since a condition for permitting voluntary departure is that the person must be of "good moral character." 8 U.S.C. § 1254 (e). The finding of a preconceived intent to remain permanently implies a lack of good moral character, under 8 U.S.C. § 1101(f)(6), and therefore should preclude voluntary departure. However, since neither party has challenged the grant of permission for voluntary departure, we cannot modify the BIA deportation order. Therefore, the decision of the BIA is affirmed in all respects.

AFFIRMED.

APPENDIX J.

Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion.

United States Court of Appeals, for the Ninth Circuit.

Joon Duck Choi, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. C.A. 75-3583.

Filed: Jan. 3, 1977.

The petitioner, through the undersigned, moves this Court for a stay of the mandate upon the memorandum decision of the above-entitled Court entered on December 15, 1976, affirming the decision of the Board of Immigration Appeals dated May 27, 1975, for a period of thirty days, to and including February 4, 1977, in order to permit petitioner to make application to the Supreme Court of the United States for a Writ of Certiorari to review the memorandum decision of the above-entitled Court affirming the decision of the Board of Immigration Appeals.

No petition for rehearing has been or will be filed with respect to the decision of the above-entitled Court entered on December 15, 1976.

Petitioner desires and intends to apply to the Supreme Court of the United States for a Writ of Certiorari for review of the order of the above-entitled Court affirming the decision of the Board of Immigration Appeals.

This motion is based on the pleadings heretofore filed in the above-entitled proceedings and the attached memorandum in support of motion.

DATED: December 30, 1976.

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:
/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

MEMORANDUM IN SUPPORT OF MOTION

Petitioner contends that the factual circumstances upon which the decision of the Immigration Service is predicated denying to petitioner the favorable exercise of discretion upon his application for status as a permanent resident are inconsistent and not compatible with the factual circumstances found to exist and which were required by statute to exist in the grant of voluntary departure to petitioner.

This Court may stay the mandate upon its memorandum decision entered on December 15, 1976, affirming the decision of the Board of Immigration Appeals for a period not to exceed thirty days, pursuant to *Rule 41, Rules of Appellate Procedure.*

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:
/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

APPENDIX K.

Order Staying Issuance of Mandate.

JOON DUCK CHOI, Petitioner, vs. Immigration & Naturalization Service, Respondent. No. 75-3583, I&NS #A19 936 054.

Filed: Jan. 14, 1977.

Upon application of Richard T. Griffin, Esquire counsel for the Petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before January 14, 1977.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ J. Clifford Wallace
J. Clifford Wallace
United States Circuit Judge.

Dated: San Francisco, Calif.

APPENDIX L.

Motion for Additional Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion.

United States Court of Appeals, for the Ninth Circuit. Joon Duck Choi, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. C.A. 75-3583.

The undersigned, counsel for petitioner in the above-entitled proceedings, on behalf of said petitioner moves this Court for stay of the mandate upon the memorandum decision of the above-entitled Court entered on December 15, 1976, affirming the decision of the Board of Immigration Appeals dated May 27, 1975, for additional time, to and including February 2, 1977, pending the filing of a Petition for a Writ of Certiorari with the Supreme Court of the United States.

On December 30, 1976, petitioner forwarded to the above-entitled Court a Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion.

On January 18, 1977, the undersigned contacted the office of the Clerk of the above-entitled Court by telephone to ascertain the status of said motion. I was informed that said motion was still pending. I then contacted the office of the judge to whom said motion had been forwarded and was informed that an Order was made on January 12, 1977, staying the mandate in the above-entitled action until January 14, 1977. I then verified that the office of the Clerk in San Francisco was unaware of said Order.

The undersigned also represents SANG YON SHIN, petitioner in Case No. C.A. 75-3582, a case involving

identical questions of law and substantially similar questions of fact as those involved in the within proceedings. On December 13, 1976, a memorandum decision of the above-entitled Court was entered in Case No. C.A. 75-3582 affirming the decision of the Board of Immigration Appeals, dated June 26, 1975. On December 30, 1976, I forwarded to the above-entitled Court on behalf of SANG YON SHIN, petitioner in Case No. 75-3582, a Motion for Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion in said action. On January 6, 1977, an order was made staying issuance of mandate in Case No. 75-3582 until January 12, 1977, a copy of which order was received by the undersigned on January 10, 1977. On January 10, 1977, I forwarded to the above-entitled Court a Motion for Additional Stay of Mandate Pending Application for Certiorari and Memorandum in Support of Motion in Case No. C.A. 75-3582. On January 18, 1977, during the course of my telephone conversations relating to the status of the motions referred to herein, I was informed that on January 14, 1977, an order was made staying issuance of mandate until February 2, 1977, but that the office of the Clerk in San Francisco had not yet received said order.

I was unable to present motions for stay of mandate pending application for certiorari in the instant proceedings as well as in Case No. C.A. 75-3582 prior to December 30, 1976, because of the difficulty encountered in arranging a joint meeting with JOON DUCK CHOI, petitioner in the instant proceedings, and SANG YON SHIN, petitioner in Case No. C.A. 75-3582, to discuss the advisability of filing a joint petition for Writ of Certiorari with the Supreme Court of

the United States. It was subsequently determined to be the desire of both petitioners to file a joint petition for Writ of Certiorari.

Because of the necessity of printing the Petition for Writ of Certiorari to the United States Supreme Court, and because the petitioners in both the instant proceeding and Case No. C.A. 75-3582 desired to file a joint Petition for Writ of Certiorari, it was not possible to draft the petition for presentation to the printer until decisions on both motions for stay of mandate had been received. On January 18, 1977, the draft of the joint petition for writ of certiorari and supporting appendices was submitted to Parker and Son, Inc., Law Printers, in Los Angeles. The setting of type thereon cannot be commenced until the stay of mandate in both cases has been resolved.

On January 10, 1977, I spoke by telephone with J. MARK WAXMAN, Assistant United States Attorney, representing the respondent in the instant proceeding as well as Case No. C.A. 75-3582, with respect to applications for an additional stay of mandate to file the Petition for Writ of Certiorari. Mr. Waxman informed me that he took no position with respect to such applications.

It is respectfully requested that an additional stay of mandate be granted to and including February 2, 1977, to permit the preparation and filing of joint petition for Writ of Certiorari to the Supreme Court of the United States on behalf of SANG YON SHIN

in Case No. C.A. 75-3582, and JOON DUCK CHOI in Case No. C.A. 75-3583.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of January, 1977, at Pasadena, California.

Respectfully submitted,

GRIFFIN, GRIFFIN & JACKSON, by:
/s/ Richard T. Griffin
RICHARD T. GRIFFIN
Attorneys for Petitioner

MEMORANDUM IN SUPPORT OF MOTION

A stay of the mandate pending application to the Supreme Court for a Writ of Certiorari may be granted upon motion, reasonble notice of which shall be given to all parties. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

Rule 41(b), Rules of Appellate Procedure

APPENDIX M.

Statement of Facts Re Joon Duck Choi (No. 75-3583).

Petitioner Choi is a married male, 62 years of age and a native and citizen of Korea. He entered the United States at Honolulu, Hawaii, on December 13, 1971, as a nonimmigrant in transit, accompanied by his wife and four children, all of whom were authorized to remain in the United States until January 11, 1972, and none of whom have departed therefrom.

On August 31, 1970, Korean passports were issued to petitioner Choi and his family for the stated purpose of emigration to the Federative Republic of Brazil. On October 25, 1971, each passport was endorsed with a visa entitling the holder thereof to permanent entry into Brazil, issued by the Brazilian Embassy in Seoul, Korea. On November 23, 1971, each passport was endorsed with a nonimmigrant transit visa (C-1) at the American Embassy in Seoul.

Petitioner Choi testified that he had previously resided in Brazil for two years, from 1961 until 1963, where he assisted immigrants from Korea through the Christian Immigration Association, and that following his return to Korea he attempted for a number of years, to arrange for some eighty families to emigrate from Korea to Brazil. Such activities were terminated in 1966, when the Brazilian government declined permission to immigrate. He further testified that two years later the Brazilian government opened immigra-

tion for individual families, at which time he began preparations to emigrate his own family from Korea to Brazil.

After engaging in sight-seeing for a period of several weeks following their arrival in the United States, at the insistence of his children petitioner Choi decided to look for the opportunity to remain in the United States following the expiration of their authorized stay in this country. He subsequently invested $10,000.00 as a partner in a grocery market, later terminated that interest, and at the time of the hearing he was in the process of reinvesting his capital in a larger enterprise costing some $90,000.00.

Petitioner Choi and his family subsequently filed applications for status as permanent residents with the Immigration and Naturalization Service at Los Angeles, which applications were denied by the District Director on February 20, 1973, upon the ground that they had falsely obtained nonimmigrant visas as part of a preconceived plan to their entry into the United States to remain indefinitely and obtain residence status.

Orders to Show Cause were issued by the District Director on May 31, 1973, and the applications for status as permanent residents were resubmitted in deportation proceedings held on June 15, 1973. On the same date said applications were denied by the Immigration Judge on the ground that the applicants did not warrant a favorable exercise of the extraordinary relief of adjustment of status.

On November 25, 1975, a petition for review of the final order of deportation (Appendix L, *infra,* Pages 26-29) was filed with the United States Court of Appeals for the Ninth Circuit, pursuant to Section 106(a) of the Immigration and Nationality Act, as added, 75 Stat. 651, 8 U.S.C. 1105a(a), with issues identical to those raised in the Shin case, *supra.*

The Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Immigration Appeals in a Memorandum decision filed December 15, 1976 (Appendix H, *infra,* Pages 17-20).

APPENDIX N.

United States Department of Justice, Board of Immigration Appeals, Washington, D.C. 20530.

May 27, 1975

Files: A19 936 054—Los Angeles
A19 936 052
A19 936 048
A19 936 050
A20 515 207
A20 515 201

In re: JOON DUCK *CHOI*
OK HEE *CHOI*
UN YUNG *CHOI*
YUNG SHUM *CHOI*
YUNG AE *CHOI*
YUNG SOOK *CHOI*

In Deportation Proceedings.

Appeal on Behalf of Respondents: Richard T. Griffin, Esq. 301 E. Colorado Blvd, Suite 502, Pasadena, California 91101.

On Behalf of I&N Service: Irving A. Appleman, Appellate Trial Attorney.

Oral Argument: February 11, 1974.

Charge: Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrants—remained longer than permitted (all respondents).

Application: Adjustment of status under section 245 of the Immigration and Nationality Act.

In a decision dated June 15, 1973, the immigration judge found all of the respondents deportable as

charged. He denied applications for adjustment of status under section 245 of the Immigration and Nationality Act submitted by the principal adult respondents and their two minor children, and he granted all of the respondents the privilege of voluntary departure. The respondents have appealed from that decision. The appeal will be dismissed.

The respondents all conceded deportability. The only issue on appeal involves the immigration judge's denial of adjustment of status. The applications for adjustment submitted by the wife and minor children are dependent on the success of the principal male respondent's application.[1]

The immigration judge assumed arguendo that the principal male respondent qualified for an exemption from the labor certification requirements of the Act as a substantial investor under 8 C.F.R. 212.8(b)(4). He concluded, however, that a favorable exercise of discretion under section 245 was not warranted. Our agreement with this latter conclusion by the immigration judge makes it unnecesary for us to decide whether the principal male respondent in fact meets the requirements of 8 C.F.R. 212.8(b)(4).

The respondents, all natives and citizens of Korea, were admitted to the United States on December 13, 1971 as nonimmigrants in transit through the United States, authorized to remain until January 11, 1972. They had represented to the American consular official in Korea that it was their intention to take up residence in Brazil after a short sightseeing stop in the United States. However, shortly after arrival in this country the respondents took up residence here and the principal

[1]We note that by the present time one of those children has turned 21.

male respondent proceeded to invest in a grocery business.

Under the circumstances of this case, it has been established that the respondents had a preconceived intent to remain in this country. They have no close family ties here, the entire family having come as transits. Although the principal male respondent allegedly has made a substantial investment in a business enterprise, this factor, even if adequately established, does not offset the respondents' attempt to circumvent the consular visa-issuing process by claiming to be in transit through the United States. Thus, we conclude that a favorable exercise of discretion is not warranted under the standards set forth in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).

The result reached by the immigration judge was correct. The appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

APPENDIX O.

Petition for Review of Final Order of Deportation (I&NS File No. A19 936 054 Los Angeles).

United States Court of Appeals for the Ninth Circuit.

Joon Duck Choi, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 75-3583.

Filed: 11-25-75.

Petitioner, JOON DUCK CHOI, by his attorneys, GRIFFIN, GRIFFIN & JACKSON, by RICHARD T. GRIFFIN, alleges as follows:

I

This is an action for judicial review of a final order of deportation pursuant to Section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

II

The petitioner, who was born March 6, 1913, is a native and citizen of Korea, presently residing in the City of Bell, County of Los Angeles, State of California. He last entered the United States at Honolulu, Hawaii, on December 13, 1971, as a non-immigrant in transit for a temporary period and authorized to remain in the United States until January 11, 1972. He was accompanied by his wife, OK HEE CHOI (A19 936 052), and their four children, YUNG SOOK CHOI (A20 515 201), YUNG SHUM CHOI (A19 936 050), and UN YUNG CHOI (A19 936 048), and YUNG AE CHOI (A20 515 207).

III

The IMMIGRATION AND NATURALIZATION SERVICE is made the respondent in this action pursuant to Section 106(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(3).

IV

On June 15, 1973, in deportation proceedings held at the District Office of the Immigration and Naturalization Service in Los Angeles, California, the applications for adjustment of status to permanent resident pursuant to Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, filed by the principal alien, together with his wife and four children, predicated upon the petitioner's investment of a substantial amount of capital in a grocery market, were denied by the Immigration Judge, and all were found deportable under Section 241(a)(2) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(2). They were accorded the privilege of voluntary departure provided they departed from the United States within thirty days, and failing to do so an alternate order of deportation was made providing for their deportation to Brazil if acceptable in said country, otherwise to Korea. An appeal from the decision of the Immigration Judge was duly taken to the Board of Immigration Appeals, Washington, D.C. On May 27, 1975, the Board of Immigration Appeals rendered its decision sustaining the order of the Immigration Judge made on June 15, 1973, and petitioner's appeal

was dismissed. Said order of the Immigration Judge is now final.

V

The validity of said order of deportation has not been upheld in any prior civil or criminal proceeding.

VI

Petitioner contests the validity of said order of deportation on the ground that the Immigration Judge abused the discretion vested in him in denying petitioner's application for adjustment of status to that of a permanent resident, and that the Board of Immigration Appeals likewise abused its discretion in sustaining the decision of the Immigration Judge, in that a more stringent standard of eligibility for such discretionary relief was applied than was authorized or required by applicable regulations and administrative precedent.

VII

Petitioner represents that similar issues are presented in the Matter of KOH, INS File No. A19 908 390, in which a Petition for Review of Deportation Order is now pending before the above-entitled Court, and in Matter of SHIN, INS File No. A19 914 852, in which a Petition for Review of Final Order of Deportation will shortly be filed in the above-entitled Court. All three matters were decided by the same Immigration Judge, SAMUEL L. HOZMAN.

VIII

Petitioner is informed and believes and on such information and belief alleges that in Matter of KOH,

decided on November 20, 1972, the Immigration Judge stated that he was unable to find that the principal alien had a preconceived intent to evade or circumvent the visa issuing process when he obtained a transit visa to enter the United States. In the instant proceedings, decided on June 15, 1973, the Immigration Judge discussed the subject of preconceived intent but made no finding with respect to said issue. In Matter of SHIN, decided on July 20, 1973, the Immigration Judge specifically found that the principal alien had a preconceived intent to remain in the United States when he obtained his nonimmigrant transit visa. In each case the Immigration Judge held that the applicant was not entitled to the "extraordinary relief" of adjustment of status because he entered the United States with a transit visa. In each case the Board of Immigration Appeals failed to enunciate the proper standard to be applied to an alien who entered the United States with a transit visa seeking adjustment of status to permanent resident. The finding of preconceived intent to circumvent the normal visa issuing process in each instance by the Board of Immigration Appeals was arbitrary, capricious and unreasonable, and results in a failure to exercise its discretion with regard to the appropriate standards to be applied to the case of an applicant for adjustment of status who entered the United States with a C-1 transit visa.

WHEREFORE, petitioner prays for an order setting aside the outstanding order of deportation against him and remanding the matter to the Immigration Service

for further proceedings in accordance with the appropriate administrative standard of eligibility for the relief requested.

DATED: November 25, 1975.

GRIFFIN, GRIFFIN & JACKSON, By:
/s/ Richard T. Griffin
Richard T. Griffin
Attorneys for Petitioner

Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1061

In the Supreme Court of the United States

OCTOBER TERM, 1976

SANG YON SHIN, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1061

SANG YON SHIN, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that this Court should exercise its power of supervision to correct an alleged abuse of discretion by the court of appeals and the Board of Immigration Appeals in denying petitioners' applications for adjustment of status under 8 U.S.C. 1255(a).

Petitioners are both Korean nationals who entered this country on nonimmigrant transit visas while purportedly enroute to permanent settlement in Brazil. Both overstayed their visas. Separate deportation proceedings were instituted at which each petitioner applied for an adjustment of status to permanent resident; in each case the immigration judge denied the application but accorded the petitioner the privilege of voluntary departure. The Board of Immigration Appeals dismissed their separate appeals and affirmed the voluntary departure orders of

the immigration judge (Pet. Apps. G, N). In each case, the court of appeals affirmed (Pet. Apps. A, I).

1. The particular facts in regard to petitioner Shin are set forth in the opinion of the Board of Immigration Appeals (Pet. App. G). Shin entered the United States claiming to be in transit to Brazil and testified at the hearing before the immigration judge that he had been preparing to emigrate to Brazil for a significant period of time prior to his departure from Korea. But Shin did not appear to be very knowledgeable with respect to Brazilian politics, geography or economics. Moreover, he arrived in this country in possession of $30,000 in United States currency, rented an apartment shortly after his arrival and arranged to purchase property less than two months after entry. Although he indicated on his transit visa application that he had never before applied for a United States visa, in fact he had previously attempted unsuccessfully to obtain a business visitor's visa. On these facts, the immigration judge concluded and the Board of Immigration Appeals concurred that Shin had entered the United States with a preconceived intent to remain. Since Shin had attempted to circumvent the visa-issuing process and no significant favorable factors were present in this case, the Board held that the denial of the adjustment of status was a proper exercise of discretion by the immigration judge (Pet. App. G).

In regard to petitioner Choi, the record shows that he rented a furnished apartment and opened a bank account approximately ten to twelve days prior to the time that he was due, under his visa, to leave this country for Brazil (R. 41-42). His explanation at the hearing before the immigration judge about why he did not depart as scheduled was that relatives here who had taken

him sightseeing had asked him to see a "few more things" (R. 38) and that he forgot the date (R. 45). On these facts the Board of Immigration Appeals concluded that Choi had a preconceived intent to remain in this country and that an exercise of discretion in his favor was not warranted; the Board therefore held that the immigration judge had reached a correct result in denying Choi an adjustment of status (Pet. App. N 35).

2. Petitioners concede they are deportable (see Pet. App. A 1; Pet. App. I 21), but contend that it was error to deny them an adjustment of status under 8 U.S.C. 1255(a). Such relief, however, is discretionary with the Attorney General, and here the court of appeals correctly affirmed the exercise of that discretion. As the court of appeals stated in *Choi*, using language that is applicable to petitioner Shin's case as well (Pet. App. I 21):

> The Board of Immigration Appeals (BIA) specifically found that the petitioner entered the United States on a transit visa with a preconceived intent to remain permanently. Such a finding justifies denial of an application for adjustment of status. *Soo Yuen* v. *INS*, 456 F. 2d 1107 (9th Cir. 1972); *Santos* v. *INS*, 375 F. 2d 262 (9th Cir. 1967). The question of adjustment of status is completely discretionary with the INS * * * .

It was well within the Board's discretion to deny an adjustment of status on the facts before it.

Petitioners suggest, however, that the finding that each petitioner had attempted to circumvent the visa-issuing process is inconsistent with the Board's decision to grant them the privilege of voluntary departure. But that suggestion has no bearing upon the Board's discretionary decision to deny petitioners an adjustment of status. Permitting voluntary departure and granting an adjustment

of status are separate and distinct forms of discretionary relief, and one may be granted while the other is denied.[1] Voluntary departure is advantageous to the United States as well as to the alien since it ordinarily saves the United States the time and expense of deportation. As the court of appeals noted (see Pet. App. A 2), the Immigration and Naturalization Service should therefore have "wide latitude" in determining whether voluntary departure should be permitted.[2] Such a determination should not control whether the alien also should receive an adjustment of status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1977.

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[1]If permitting voluntary departure were inconsistent with denying an adjustment of status, the proper conclusion is not, as petitioners contend, that the denial of an adjustment of status was an abuse of discretion but rather, as the court of appeals noted (Pet. App. I 22), that voluntary departure may have been erroneously permitted. Since permission to depart voluntarily is favorable to petitioners, they understandably did not challenge such permission in this case.

[2]Contrary to petitioners (Pet. 7), there is no inconsistency between the holdings of the court of appeals in these cases and its prior holding in *Trias-Hernandez* v. *Immigration and Naturalization Service*, 528 F. 2d 366, 370. *Trias-Hernandez* held merely that it is not an abuse of discretion to *deny* voluntary departure when no evidence of good moral character is presented.